

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

APRIA HEALTHCARE GROUP, INC.,¹

Employer,

Case 27-RC-8249

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL UNION NO. 435,

Petitioner.

DECISION AND DIRECTION OF ELECTION

On May 22, 2003, International Brotherhood of Teamsters, Local Union No. 435 (herein the Union or Petitioner), filed a petition under Section 9(c) of the National Labor Relations Act (herein the Act) seeking to represent certain employees of Apria Healthcare Group, Inc. (herein Apria or Employer). On June 4 and 5, 2003, a hearing was held in this matter before a hearing officer of the National Labor Relations Board, and, following the hearing, the parties filed briefs.

The Petitioner seeks to represent the following employees:²

INCLUDED: All full-time and regular part-time employees employed by the Branch Warehouse/Logistics Division of the Employer's facilities at 7910 Shaffer Parkway in Littleton, Colorado, and 11600 E. 53rd Avenue in Aurora, Colorado, including dispatch employees, patient service technicians, clinical service technicians, delivery technicians, transportation leads, patient service coordinators, and branch warehouse clerks.

¹ The name of the Employer appears as amended at hearing.

² At hearing, the Petitioner amended its proposed unit description to include transportation leads and patient service coordinators, in agreement with the Employer's position. The classification of branch warehouse clerks was also added by amendment at hearing to clarify that the Petitioner is not seeking regional warehouse employees.

EXCLUDED: respiratory therapists, Regional employees, office clerical employees, salesmen, guards, professional employees, and supervisors as defined in the Act.

This case presents the issue of whether the petition should be dismissed because it was prematurely filed, as well as several issues concerning the scope and composition of the petitioned-for unit.

The Employer contends that the petition is premature because Apria is in the process of reducing the size of its Littleton branch to form several smaller branches, one of which is the Aurora, Colorado, facility named in the petition.³ In addition, with respect to the scope of the petitioned-for unit, the Employer asserts that a combined unit of Littleton and Aurora employees would not constitute an appropriate bargaining unit and that certain regional employees who work in the Littleton facility must be included in any unit found appropriate. The Petitioner disagrees with the Employer's position, but is willing to proceed to an election in separate units for the Littleton and Aurora facilities if a single unit is not found appropriate. Regarding the composition of the unit, the Employer maintains that any appropriate unit must include respiratory therapists, clinical assistants, the pharmacy warehouse clerk, and pharmacy delivery technicians. The Petitioner argues that these employees do not enjoy a community of interest with the petitioned-for employees sufficient enough to compel their inclusion.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Based upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. Apria Healthcare Group, Inc., a Delaware corporation, is engaged in the business of providing and distributing home medical equipment and respiratory services and supplies. Its principal offices are in Lake Forest, California, with operations

³ This facility is also known as the Northeast Denver branch.

throughout the United States, including Littleton and Aurora, Colorado. Apria annually purchases and receives at its Colorado facilities goods and services valued in excess of \$50,000 directly from sources outside the State of Colorado. Based on these stipulated facts, I find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the policies of the Act to assert jurisdiction in this matter.

3. The Petitioner, International Brotherhood of Teamsters, Local Union No. 435, is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. For the reasons discussed below, a question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.
5. The following employees of the Employer constitute separate appropriate units for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Littleton Unit

INCLUDED: All full-time and regular part-time dispatch employees, patient service technicians, clinical service technicians, delivery technicians, transportation leads, patient service coordinators, and branch warehouse clerks employed in the Employer's Branch Warehouse/Logistics Department at 7910 Shaffer Parkway, Littleton, Colorado.

EXCLUDED: All respiratory therapists, clinical assistants, pharmacy delivery technicians, pharmacy warehouse clerks, regional employees, office clerical employees, salesmen, professional employees, guards, and supervisors as defined in the Act.

Aurora Unit

INCLUDED: All full-time and regular part-time dispatch employees, patient service technicians, clinical service technicians, delivery technicians, warehouse clerks, and transportation leads employed in the Employer's Branch Warehouse/Logistics Department at 11600 E. 53rd Avenue, Aurora, Colorado.

EXCLUDED: All respiratory therapists, clinical assistants, office clerical employees, salesmen, professional employees, guards, and supervisors as defined in the Act.

BASIS FOR DECISION

I. FACTS

The Employer, formed in 1995 from the merger of Abbey Healthcare Group and Homedco Group, is a home healthcare company providing delivery, set up, and maintenance of oxygen, delivery and set up of durable medical equipment such as hospital beds, wheelchairs, and walkers, delivery of enteral nutrition supplies, and the provision of infusion therapy medications. The company operates in all 50 states and has approximately 400 branches organized under four geographic divisions, each with four regional offices. Apria's Rockies region contains 32 branches or service centers located in Montana, Wyoming, Nebraska, and Colorado, including the Littleton and Aurora branch facilities at issue here. The Employer has other Colorado facilities located in Louisville, Loveland, Colorado Springs, Grand Junction, Alamosa, La Junta, and Pueblo/Canyon City. Littleton, reportedly Apria's largest branch, serves the entire Denver metropolitan area, except for some coverage provided by the Louisville branch.

The Employer has contracts with hospitals and doctors to provide equipment and services to patients who have been discharged from a hospital, but require further medical treatment and services at their homes. When a patient is to be released from a hospital or other facility, the Employer is notified and provided with instructions regarding the home medical equipment and services that will be required. The majority of these referrals are respiratory patients in need of oxygen delivered to their residence on a regular basis. These home deliveries and related services are provided by branch employees referred to as delivery technicians (DTs), patient service technicians (PSTs), clinical service technicians (CSTs), transportation leads (TLs), and respiratory therapists (RTs). In addition, clinical assistants (CAs) visit hospitals and equip

patients with portable oxygen units as they are being discharged and also arrange for home delivery of a stationary unit. These equipment delivery and patient service functions are supported by other branch employees such as dispatchers, warehouse clerks, and patient service coordinators.

The delivery technician (DT) is an entry-level driver position. Although the Littleton branch has employed delivery technicians in the past, at the time of the hearing neither Littleton nor Aurora had any employees in this classification. There was, however, an opening for one delivery technician in each branch and the Employer was actively seeking to fill these positions. The DTs drive vans, but are not required to have a commercial driver's license. They deliver supplies and smaller medical equipment to patients, but they do not set up or instruct patients in the use of more complex equipment. They may occasionally deliver oxygen canisters, but they do not deliver liquid oxygen.

The patient service technicians (PSTs) drive box trucks equipped with a 190-gallon liquid oxygen tank and other supplies. They are required to have a commercial driver's license with tanker and HAZMAT endorsements. In addition to liquid oxygen, PSTs deliver oxygen canisters, supplies, and medical equipment to the patients on their assigned route. Each day, they prepare a delivery schedule from patient delivery logs and work orders received from dispatchers. The on-duty dispatcher and patient service coordinator receive a copy of the PST's delivery schedule. Branch warehouse employees retrieve and load daily supplies needed by a PST and fill the liquid oxygen tanks on their trucks. The PST performs a daily vehicle inspection and submits the inspection report to the dispatcher. While making deliveries, the PST uses a company supplied mobile telephone to keep in touch with the dispatcher, to receive

additional delivery orders, and also to respond to patient service coordinator inquiries regarding expected time of arrival at a particular patient's home.

When making their deliveries, the PST either replaces a gas oxygen canister with a full one, or refills a patient's liquid oxygen tank from the supply carried on their truck and checks the oxygen concentrator to verify the flow rate. They also deliver, set up, and pick up medical equipment such as wheelchairs, walkers, shower benches, and commodes. As needed, the PST provides basic instruction on the use of equipment. The PST is expected to report to their supervisor any observed abuse, neglect, or other potential problems such as smoking near the oxygen supply. These reports are turned in to the PST's supervisor along with the other daily paperwork and forwarded to the respiratory therapist manager for follow up.

Because of their greater experience, clinical service technicians (CSTs) are considered the "upper echelon of drivers" and typically handle the equipment set up and instruction for new patients. CSTs perform their duties in much the same way as PSTs, except they normally do not have a regular route, responding instead to work orders for new service. Since most new patients are released from hospitals during the afternoon hours, CSTs work shifts beginning around mid-day. They are required to have a commercial driver's license with HAZMAT and tanker endorsements and drive the same type of box trucks as PSTs.

There were two Littleton branch employees classified as transportation leads (TLs) at the +9time of the hearing. None were employed at the Aurora branch, but one position was open. TLs are drivers who have typically worked in a PST, CST, or DT position previously, and they continue to perform delivery functions while serving as leads. Their lead duties include training and coaching new employees, handling driver issues, and communicating with the supervisor regarding problems. Sometimes they ride with new drivers to advise them on how to perform

their work more efficiently. During the workday, they keep in touch with the other drivers by mobile phone. The average hourly wage rate⁴ of the two TSLs is \$1.09 more than the average wage rate of CSTs, the highest paid petitioned-for classification. With the exception of one PST, the TLs are the highest paid employees in the petitioned-for group.

Dispatchers work the same shifts as drivers. They receive and schedule work orders by either giving the orders to drivers at the beginning of their shifts or, in the case of “add-on” orders received after drivers are out in the field, by communicating the order by mobile phone to the appropriate driver. Based upon patient delivery logs and the orders received from the dispatcher, drivers prepare their route schedule each day. Dispatchers also maintain the paperwork associated with the orders and the drivers submit their delivery records to the dispatcher after each shift. PSTs and CSTs are required to call the dispatcher following every third stop.

The four patient service coordinators (PSCs) perform work previously performed by dispatchers. They work in an office in the Littleton branch facility where they handle telephone calls from patients inquiring about the status of their orders and deliveries. The PSCs contact delivery personnel or other employees to determine the expected time of delivery and notify the patient. This position was created in February, 2003, because of a significant increase in patient delivery inquiries being handled by the dispatchers. These inquiries were forwarded to the dispatchers from the centralized customer contact center recently created to handle patient calls for the Louisville, Loveland, Aurora, and Littleton branches. The Employer does not intend to employ PSCs at the Aurora branch, nor at the other anticipated Denver metropolitan area branches.

⁴ The average hourly wage rates used in this decision are based on the range of actual rates paid as set forth in Petitioner’s Exhibit No. 3, a document prepared by the Employer for the hearing pursuant to subpoena.

There are 10 Littleton branch warehouse clerks. They work the same shifts as the delivery employees and perform the typical warehouse duties of receiving, storing, retrieving, and distributing the products, supplies, and equipment used in the Employer's business. When drivers pick up equipment no longer needed by patients, including empty oxygen canisters, they leave these items in their truck or van when they return at the end of their shift. Warehouse clerks unload, clean, and store the returned items. Empty canisters are stacked on a cart and wheeled into the regional transfill area to be cleaned and refilled. The branch warehouse clerks perform minor equipment maintenance such as changing filters and batteries. Items in need of more extensive maintenance or repair are transferred to the repair department in the regional warehouse.

Branch warehouse clerks restock the driver's truck and vans with routine supplies before they begin their deliveries each day. Before leaving to make their deliveries, the drivers turn in their daily work orders to the warehouse, and a clerk retrieves the needed items from the warehouse inventory and loads them onto the driver's vehicles. Throughout the day, the clerks also pull orders for lobby walk-in customers. In addition to general warehouse duties, each clerk has specific jobs they are responsible for such as cleaning liquid oxygen tanks, cleaning and testing medical equipment, and filling liquid oxygen tanks on the trucks.

The Employer's Rockies regional offices and warehouse operations, established in 1996, are housed in a large building shared with the Littleton branch. The 29 hourly regional employees at issue here test and repair equipment, clean and refill oxygen canisters, and perform typical warehouse duties in providing support services for all 32 branches and service centers within the Rockies region. These regional employees work in the regional warehouse which is separated from the Littleton branch warehouse by a chain-link fence.

Each branch, including Littleton and the newly opened branch in Aurora, is a separate cost and profit center for accounting purposes and is run by an on-site manager with various department heads reporting to the branch managers. The branch manager at Littleton is Julie Nemitz, and among the department heads reporting to her are logistics manager Arnold Arrieta and the respiratory therapists supervisor William McClelland. As logistics manager, Arrieta supervises all the petitioned-for employees at the Littleton branch, including warehouse employees. The manager for the Aurora branch is Kelly Erickson, with logistics supervisor Randy Worthington reporting to her. Worthington is in charge of the distribution function. Although the branch managers report to regional vice-president Rick Little, regional and branch employees have no common supervision and the region is considered a separate center for accounting purposes.

Apria has recently created a new distribution model the implementation of which will involve splitting up large metropolitan branches such as Littleton into smaller branches located closer to the patients served. Implementation of this new model is well underway in the Employer's Southern California region and has recently been initiated in the Denver metropolitan area with the opening of the Aurora branch at the beginning of May, 2003. Other Denver area branches are planned for Arvada, Parker, and downtown Denver. The Employer expects the Arvada and Parker branches to be operational by the end of 2003, but no target date has been established for the downtown Denver branch.

II. ANALYSIS

The Board has long held that a unit need not be the only appropriate or even the most appropriate unit, but merely an appropriate unit. *Overnite Transportation Company*, 322 NLRB 723 (1996); *Omni International Hotel*, 283 NLRB 475 (1987). In accord with that principle, the

Board's policy generally is to accept a petitioned-for unit as long as it is one of the many possible appropriate units. If that unit is appropriate, then the inquiry into the appropriate unit ends. *Boeing Co.*, 337 NLRB No. 24 (2001).

A. Composition of the unit

Before the Employer's argument concerning the timeliness of the petition can be considered, the disputes regarding unit composition and scope must be resolved in order to determine whether a substantial and representative complement of unit employees exists. The employee job classifications that the Employer would include and the Petitioner would exclude are discussed below.

1. Respiratory Therapists

There are currently 19 respiratory therapists (RTs) employed at the Littleton branch, 6 of whom are per diem employees who work only as needed. The Employer estimates that the Aurora branch will have 4 RTs, but at the time of the hearing, none of those positions had been filled, and the exact number to be hired had not been determined. As noted above, RTs at the Littleton branch are supervised by William McClelland, who does not supervise any of the petitioned-for employees and who reports directly to Littleton branch manager Nemitz. They are the most skilled of all the employees who provide deliveries and services to patients and they must be licensed by the State of Colorado to practice respiratory therapy. The average hourly wage rate for RTs is \$20.60, a rate 30 per cent higher than the \$15.89 average rate for the two transportation leads, the highest paid classification of petitioned-for employees.

The basic duties of a RT involve delivering oxygen and other therapeutic equipment to patients at their residence, setting up equipment, and instructing patients and care givers in the use of the equipment. RTs are the only employees who can perform certain specialized

functions, such as testing patient's blood saturation levels, providing services to pediatric patients and tracheal patients, and setting up ventilators and CPAP (Continuous Positive Airway Pressure) therapy machines. Also, at in-service training sessions which are conducted about three or four times a year, RTs sometimes provide instructions to the unlicensed oxygen delivery employees.

The RTs receive their assignments each day from the RT scheduler, not the dispatcher. The RT scheduler uses the same office as the patient service coordinators at the Littleton branch facility. They communicate with the Littleton office by mobile phone, and they receive "add-on" work orders by the same means. RTs are trained on the Employer's driver training manual, the same as the unlicensed delivery employees. They drive a van stocked with supplies, but are not required to have commercial driver's license. Although warehouse clerks assist RTs in locating supplies and occasionally help load equipment into their vans, there is no evidence of regular interaction with other petitioned-for employees. The RTs are occasionally at a new patient's home when a CST or PST drops off a liquid oxygen tank.

Under rules promulgated pursuant to Colorado's Respiratory Therapy Practice Act (herein CRT Act),⁵ an unlicensed oxygen delivery employee such as PSTs can deliver, set up, inspect, and maintain an oxygen apparatus in a patient's home, and they may also instruct the patient about the apparatus' operation. They may not, however, perform pulse oximetry testing, interpret or report physician orders, titrate the oxygen level, discuss disease status with the patient, or engage in any other task that constitutes the practice of respiratory therapy.

According to the CRT Act, the practice of respiratory therapy that the unlicensed employees are not permitted to perform includes, in part, pulmonary care services, instruction on the techniques

⁵ Administrative notice is taken of the Colorado Respiratory Therapy Practice Act, §12-41.5, C.R.S. and Colorado Respiratory Therapy Licensure Rules & Regulations, Rule 1 (Adopted September 25, 2002), 4 CCR 741-1.

and skill of respiratory care, administration of pharmacological, diagnostic, and therapeutic agents, observation of response to treatment and determination of whether such response is abnormal, use of required diagnostic and testing techniques, and the transcription and implementation of written and verbal orders of a physician.

I find that the Employer's respiratory therapists do not have a sufficient community of interest with the petitioned-for employees to require their inclusion in the bargaining unit. Contrary to the petitioned-for employees, respiratory therapists are required to be licensed to practice respiratory therapy by the State of Colorado. They also possess greater skill and training, have separate supervision, receive significantly higher wages, and perform a function which is fundamentally different from that of the unlicensed delivery employees, warehouse clerks, and dispatchers sought by the Petitioner. The fact that they transport certain equipment and supplies from the warehouse to a patient's residence does not change the fact that the RTs are the only employees qualified to practice respiratory therapy when they arrive at their destination. It is apparent from the record that RTs are trained, qualified, licensed, hired, compensated, and expected to perform duties that unlicensed employees cannot perform. Accordingly, based upon the entire record and the reasons set forth above, respiratory therapists are excluded from the appropriate bargaining unit.

2. Clinical Assistants

There are four clinical assistants (CAs) working at the Littleton facility. The Employer anticipates that no CAs will be hired to work out of the Aurora branch. The CAs, a classification previously known as "clinical account specialist," are supervised by market manager Jim Howard, who reports directly to the vice-president of sales, Danette Stevens. Howard and

Stevens, as well as the CAs, have offices in “the regional end of the building,” according to testimony, although the record indicates that CAs are considered Littleton branch employees, and they reportedly obtain their supplies and equipment from the Littleton branch warehouse.

The CAs are each responsible for certain hospitals that they visit daily to meet with referral patients being released to go home. The CAs set up the patients being dismissed from the hospital with a portable oxygen unit, and they call in an order for the dismissed patient to the contact center. Occasionally, the CAs speak directly with a CST or RT regarding the patient’s needs. When the patient reaches their home, the patient notifies the contact center and a RT, CST, or PST is dispatched to the home to deliver a stationary oxygen unit and related services. There is no record evidence that the CAs visit the patients at their homes.

The CAs drive vans and do not need a commercial driver’s license. They are not licensed or certified by the State of Colorado to practice respiratory therapy. The record contains no indication that CAs are expected to have any specialized education or training, although they are “encouraged” to have a good patient care and logistics background. The average hourly wage rate for CAs is \$16.04, which is slightly higher than the \$15.89 average rate of the two transportation leads, the highest paid classification of petitioned-for employees. It is also higher than the average rate of CSTs and PSTs, the next highest paid classifications, and substantially higher than the remaining classifications.

I find that the clinical assistants do not have a sufficient community of interest with the petitioned-for employees to require their inclusion in the bargaining unit. They have separate supervision and their immediate supervisor reports to a regional level manager, not to the Littleton branch manager. Although they perform tasks somewhat related to the overall function of the petitioned-for employees, the CAs appear to be part of a marketing function. In any event,

it is clear that the CAs, like the RTs, are not part of the Employer's logistics department. Not only is their office area physically separated from the branch employees, but the sales and marketing mission in which the CAs appear to be involved is itself far removed from that of the logistics department and its warehouse clerks, dispatchers, and drivers. Thus, the fact that the Employer has organizationally attached the CAs to the Littleton branch is not dispositive, in light of the other more critical facts discussed herein. The only interaction CAs have with the petitioned-for employees is when they obtain supplies and equipment from the warehouse or occasionally communicate directly with a CST or PST regarding the needs of a patient. The limited nature of these communications is supported by the testimony of 2 PSTs and 1 CST, with a combined total of 7 years as drivers for the Employer, only one of who had ever talked with a CA regarding a patient, and that occurred only once. Moreover, even this limited interaction that CAs have with CSTs or PSTs evidently would not be confined to CSTs and PSTs from the Littleton branch, as patients being dismissed from Denver area hospitals reside in locations that presumably could be serviced by any of the Employer's Colorado branch operations. Further, while there have been several employees who have permanently transferred to CA positions from CST or DT positions in Littleton, it is more significant that there is no evidence of temporary interchange or transfers. *See MGM Mirage*, 338 NLRB No. 64, slip op. at 7 (November 20, 2002); *Ore-Ida Foods, Inc.*, 313 NLRB 1016, 1021 n.4 (1994); *Hilton Hotel Corp.*, 287 NLRB 359, 360 (1987).

3. Pharmacy delivery technicians and warehouse clerk

There are two pharmacy delivery technicians (DTs) and one pharmacy warehouse clerk who work for the pharmacy which is located in the Littleton facility. The Employer does not anticipate employing these classifications or having a pharmacy at the Aurora branch. The

pharmacy supervisor's position was vacant at the time of the hearing, and the pharmacy employees were supervised by the regional infusion manager, Angela Martinelli. Although the record does not indicate whether the pharmacy will remain a part of the Littleton branch when Littleton is split into smaller branches, there is testimony regarding an idea for a future "integrated delivery" system that might place pharmacy DTs under the "logistics side of the business."

The record provides scant details regarding the operation and function of the pharmacy. It is apparent from the available evidence, however, that the function of the pharmacy is to dispense and deliver infusion medications and enteral nutrition supplements to homecare patients. According to the record, the pharmacy warehouse clerk receives, counts, stores, and retrieves the product dispensed and delivered through the pharmacy. These items are stored in a small portion of the branch warehouse near a door leading into the pharmacy. The pharmacy shipments are delivered to the branch warehouse loading docks and the pharmacy warehouse clerk counts the product and puts it away, sometimes with the help of a branch warehouse clerk. The record, however, does not indicate how often pharmacy shipments are received, nor how often a branch warehouse clerk provides assistance.

The pharmacy warehouse clerk and the pharmacy DTs clean and test infusion tanks and other infusion products in a corner of the branch cleaning aisle. They also pressure wash certain equipment in a bay area which is also used by branch warehouse employees. Using a van, the two pharmacy DTs deliver pharmacy products to patients primarily on an as-needed basis, but they also make some recurring deliveries. Canned nutrition supplements are at times delivered by branch PSTs if they are making a recurring oxygen delivery to the same patient, but the record does not establish how often this occurs.

I find that there is insufficient evidence to conclude that the pharmacy employees must be included in the bargaining unit. Although they work in the same general area and perform some tasks that are similar to those performed by the branch warehouse clerks and delivery technicians, the record fails to establish significant interaction or interchange with the petitioned-for employees. The permanent transfer of some pharmacy employees to regional positions is not relevant to the petitioned-for unit, which is limited to branch employees. In any event, under the Board cases noted above, permanent transfers are not entitled to as much weight as temporary interchange in assessing the community of interest shared by two groups of employees. The record fails to show that assistance received by the pharmacy warehouse clerk from branch warehouse employees is more than occasional. There is no dispute that the pharmacy employees are separately supervised (at present by a regional manager) and any plans for future integration with the branch logistics department are speculative at this point. Accordingly, I conclude that an insufficient basis exists for requiring the pharmacy warehouse clerk and pharmacy delivery technicians to be included in the appropriate bargaining unit.

B. Scope of the unit

Turning now to the appropriate scope of the bargaining unit sought by the Petitioner, there are two issues raised by the Employer, as follows:

1. Appropriateness of a single unit

The Employer contends that a unit composed of employees of both the Littleton and Aurora branches would not be appropriate because the two branches are separate and independent facilities with separate supervision and lack significant employee interchange or interaction. The Petitioner argues that there is enough interchange and integration between the two facilities to overcome the presumptive appropriateness of single location units, although the

Petitioner has also indicated a willingness to proceed to an election in single location units in Littleton and Aurora if elections are directed in these single units.

At the time of the hearing, all of the Aurora employees were transfers from the Littleton branch, and the Aurora delivery routes were ones formerly serviced by Littleton employees. Both the routes and the employees, however, have been permanently transferred and, therefore, the transfers fail to establish an ongoing interchange between employees of the two facilities. Moreover, the Board gives little weight to transfers resulting from the opening of a new facility in determining the proper scope of a unit. *Passavant Retirement and Health Center, Inc.*, 313 NLRB 1216 (1994); *J. W. Mays, Inc.*, 147 NLRB 968 (1964).

The Petitioner also notes that the Aurora and Littleton employees assigned “on-call” duty are required to cover the entire area previously served by Littleton, and there have been occasions of interchange when an Aurora driver covered a Littleton route. It is undisputed, however, that the Aurora branch was not fully staffed at the time of the hearing and that its transition to becoming a separate, independent facility was not yet completed. Moreover, the Employer claims that the temporary and occasional interchange that has occurred during the transition period will not continue in the future, and there is no evidence to the contrary.

There are certain factors present which favor a multi-location unit, such as common personnel and labor relations policies, identical work skills, the same terms and conditions of employment, and apparent lack of local control over major disciplinary decisions. These factors, however, are outweighed by the more compelling factors favoring separate units noted above. In addition, it is noted that there is no evidence of a multi- or dual-unit bargaining history, and the Aurora and Littleton facilities are geographically on opposite sides of the Denver metropolitan

area at a driving distance of more than 30 miles by the fastest route.⁶ In light of all the circumstances, I find that there is an insufficient basis to warrant deviating from the Board's preference for single location units by including the Aurora and Littleton branch employees in a single bargaining unit. *Hegins Corp.*, 255 NLRB 1236 (1981). Accordingly, I shall direct separate elections for the Littleton and Aurora units found appropriate.

2. Inclusion of the regional employees

The remaining scope-of-unit issue to be decided is the Employer's contention that the 29 hourly regional employees at the Littleton facility have a sufficient community of interest with the petitioned-for employees to compel their inclusion in the bargaining unit. The Petitioner disputes this contention, arguing that an insufficient community of interest exists to require the inclusion of the regional employees in a bargaining unit with the petitioned-for Littleton branch employees.

The Employer's Rockies region is responsible for providing support services to the 32 service centers within the four-state region. The hourly regional employees work in the large open warehouse area of the Littleton facility. The region uses one end of the building and the branch uses the other, with the two portions divided by two 20-foot high chain-link fences with a walkway between them. Eleven of the regional employees at issue are assigned to the regional repair center, seven are warehouse clerks, and the remaining eleven employees work as transfill technicians. The repair center employees are supervised by regional repair center manager Gerald Chesbro, the warehouse clerks are supervised by regional warehouse manager Ron Hoffman, and the transfill employees are supervised by regional transfill supervisor John Smith. Each of these supervisors reports to Kevin Eaton, the regional logistics manager.

⁶ I take administrative notice of these facts based upon an examination of commonly available map resources.

The regional repair center is responsible for testing and repairing equipment for the various branches and other service centers in the Rockies region. They use specialized equipment in their work, as well as basic tools. On occasion, regional repair technicians with specific expertise have provided in-service training to Littleton branch employees on repair and troubleshooting of that equipment.

The regional transfill technicians clean and refill the empty oxygen canisters returned by the service centers. This job involves removing stickers from the canisters, sanitizing them, and filling with oxygen gas obtained by warming liquid oxygen. The region has a liquid oxygen supply which remains separate from that used by the Littleton branch. According to testimony, refilled canisters of oxygen are transported to the Aurora branch facility by a tractor-trailer vehicle and the trailer is left for the branch employees to unload as canisters of oxygen are needed. Presumably, this method is used for resupplying other locations as well. At the Littleton branch, empty canisters are unloaded from the delivery trucks by branch warehouse clerks, then stacked on carts and wheeled into the region transfill area. The transfill technicians return a cart of refilled canisters to the staging area in the branch warehouse for loading onto the delivery trucks by branch warehouse clerks, as needed.

The regional warehouse clerks receive, count, store, retrieve, and ship supplies and equipment used by the service centers within the region. They routinely prepare shipments to be sent by United Parcel Service (UPS). According to testimony, their job descriptions are the same as branch warehouse clerks, except they are not required to clean equipment.

In support of its position that hourly regional employees should be included in the bargaining unit, the Employer relies upon record evidence of permanent transfers, temporary

interchange, shared facilities, common pay and benefits, interaction among the two groups of employees, common personnel policies, and a shared human resources manager.

Regarding permanent transfers, the Employer contends that records received into evidence establish that almost the entire initial complement of hourly regional employees transferred from the Littleton branch, and that approximately one-half of the current employees previously worked for the Littleton branch. However, the Board attaches little significance to transfers resulting from the opening of new facilities, transfers involving promotions, or transfers occurring at the employee's convenience in determining the scope of the appropriate unit. *Renzetti's Market*, 238 NLRB 174, 176 n.8 (1978). The records relied upon by the Employer indicate that many of the transfers resulted from promotions or voluntary demotions, and there is no evidence to indicate that the remaining were not similarly at the employee's convenience.

Concerning temporary interchange, the record indicates that a few of the hourly regional employees have a commercial drivers license and helped the Littleton branch with deliveries during a recent snowstorm. In the week prior to the hearing, one regional warehouse clerk helped the Littleton branch warehouse with counting equipment, putting equipment away, and sending equipment out by UPS. Also, as recently as the month before the hearing, regional repair technicians helped Littleton branch employees handle equipment backlogged in the branch cleaning aisle. While this evidence shows that interchange has occurred recently, there is no evidence that such assistance occurs frequently. In fact, the Employer's regional vice president of operations, Rick Little, testified that delivery assistance does not occur on a "normal" or "routine basis."

The facilities that the Employer claims are shared by the two groups of employees include the dock area, compactor, employee entrances, pressure wash bay, lunchroom,

restrooms, parking lot, smoking areas, and copy rooms. Employee witnesses presented by the Petitioner disputed the claim that the employee entrance and dock area are shared. Since the hourly regional employees and the branch warehouse, dispatchers, and patient service coordinators all work under the same roof, it is reasonable to conclude that they do come into contact with one another occasionally, particularly when they leave their separate work areas for some reason. The transportation leads, PSTs, CSTs, and DTs, however, are out of the building most of the day and the import of shared facilities does not extend to those employees.

More importantly, the record evidence fails to establish substantial interaction between the hourly regional employees and the employees requested by the Petitioner. Employee witness Mike Woodside testified that during his one year of employment as a PST, he has never gone into the regional warehouse area and has had no involvement with regional warehouse employees. Another PST employee witness, Jeremy Richardson, testified that during his employment of over three years he has only been in the regional warehouse on one occasion when escorted there by his supervisor for training purposes. He further stated that he did not believe he was permitted to enter the regional warehouse and that he did not deal with the employees there. Tyler Richardson, who has worked as a PST and CST since 1999, also testified that he has had no interaction with regional employees.

Troy Gordon, a corporate logistics trainer for the Employer's central division, was called by the Employer as a witness and testified, in part, regarding employee interaction at the Littleton facility. Mr. Gordon, who is headquartered in Littleton, previously was a transportation supervisor at the Littleton branch for about nine months before being promoted over a year ago to his present position. In general, his testimony regarding interaction was that product is always moving back and forth between the regional warehouse area and the branch warehouse area. He

did not, however, provide any specifics about how this physical movement of product resulted in interaction between employees. For example, Mr. Gordon described branch warehouse employees wheeling empty oxygen canisters over to the transfill area and transfill technicians walking a cart of filled canisters back to the branch warehouse staging area, but there is no indication regarding what, if any, interaction between employees results from this movement of canisters.

The Employer failed to present any branch warehouse employees or hourly regional employees to testify regarding the nature and degree of interaction that occurs between the two groups of employees. Without such evidence, it is difficult to determine whether substantial interaction exists. Nevertheless, it is apparent that the hourly regional employees role in providing support services to the service centers within the Rockies region, including considerable amounts to the Littleton branch, and the close physical proximity of the Littleton branch warehouse employees, results in some degree of interaction on a daily basis.

Turning to the Employer's argument that the two groups of employees share common pay grades and fringe benefits, it is uncontested that all hourly-paid employees receive the same benefits. The existence of common pay grades, however, is of little significance without knowing the actual wages received by the employees being compared. Without regard to their wages, evidence shows that the 11 transfill technicians receive an average hourly wage rate which is 7 per cent less than the average hourly wage rate of the 10 Littleton branch warehouse clerks, the lowest paid classification requested by the Petitioner. The regional repair technicians and the regional warehouse clerks receive average hourly wage rates comparable to those of the petitioned-for employees.

All hourly employees are subject to the same personnel policies. Testimony that the regional human resources representative at the regional office handles the “human resource function” for both the regional employees and the Littleton branch employees is not challenged. Although the record is unclear regarding the exact functions performed by the human resources representative, apparently those functions include handling job postings and job bids and similar administrative duties related to personnel matters. There is no indication in the record that the human resources representative exercises any control over day-to-day operations of the branch or region or exercises any managerial authority with respect to determining employment conditions or labor policy affecting the employees at issue here. Since the record fails to establish any function for the regional human resources representative beyond administrative matters, the evidence presented is of little or no significance in determining the appropriate unit.

In light of the above, it is evident that some relevant factors are present which would support the Employer’s position that hourly regional employees share a community of interest with the petitioned for employees, particularly those employed as Littleton branch warehouse clerks. Under all the circumstances, however, the hourly regional employees do not have sufficient interests in common with the petitioned-for employees to warrant a conclusion that they must be included in an appropriate unit. Therefore, relying particularly on the lack of common immediate as well as intermediate supervision, the absence of substantial temporary interchange, and the separate organizational and functional roles of the two groups of employees, I find that the petitioned-for employees at the Littleton branch are an appropriate unit without including the hourly regional employees at the same location.

C. Timeliness of the petition

The remaining issue to consider is whether the petition in this matter is premature. The Employer contends that it would be inappropriate to conduct an election at this time because the Aurora branch is an expanding unit and the Littleton branch is a contracting unit. The Petitioner argues that an immediate election is appropriate because there is a substantial and representative complement of employees at present and the plans to open new branches are indefinite.

1. The expanding Aurora unit

As part of a corporate plan to split up large metropolitan branches into smaller branches located closer to the patients served, the Denver metropolitan area will ultimately have six branches, including the existing ones at Littleton and Louisville. As a result of new branches to be located in Arvada, Parker, downtown Denver, and Aurora, fewer employees will be needed at the Littleton branch. The Employer claims that all of the new branches except downtown Denver will be opened by the end of 2003.

The Aurora branch was partially operational at the time of the hearing, with a branch manager and logistics supervisor in place, as well as 14 employees, all of who reportedly transferred from the Littleton branch. The Employer was also in the process of negotiating a building lease for its Arvada branch at the time of the hearing, and expected to open that branch by September, 2003. Potential lease sites for the Parker branch had been identified at the time of the hearing, and that branch was expected to open in December, 2003. According to testimony of Employer witness Michael Lawler, corporate vice president of logistics, a timetable for opening a downtown branch had not been established because the Employer had only recently begun a preliminary review and analysis of demographic information.

According to the organizational chart for the Aurora branch, when fully staffed, that facility will have 10 PSTs, 4 CSTs, 4 warehouse clerks, 3 dispatchers, and 1 transportation lead, or a total of 22 employees in classifications requested by the Petitioner. Aurora will not have any patient service coordinators or clinical assistants. Respiratory therapists will also work out of the Aurora facility, but neither the organizational chart nor the hearing record indicates how many RT positions there will be when fully staffed. The record establishes that Arvada and Parker branches will have the same organizational model as Aurora, with approximately the same number of employees in each position.

Of the eventual 22 Aurora employees in classifications requested by the Petitioner, as mentioned above, 14 of those positions had been filled at the time of the hearing by transfers from the Littleton branch. These voluntary transfers apparently occurred as a result of meetings the Aurora branch manager held with Littleton branch employees who live in the Aurora area. The 8 unfilled Aurora positions were posted within the Rockies region on June 2, 2003, with job bid requests due by June 6, after the close of the hearing in this matter. According to testimony, any openings remaining after completion of the Employer's bidding process would be filled from outside the company.

The parties agree that the applicable test to determine if an immediate election should be conducted in the face of an expanding unit is whether the present complement of employees is substantial and representative of the ultimate complement to be employed in the near future. Although there is no flat rule for making such a determination, the Board stated in *MJM Studios of New York, Inc.*, 336 NLRB No. 129, slip op. at 3 (2001), that it

finds an existing complement of employees to be "substantial and representative" when approximately 30 percent of the eventual complement is employed in 50 percent of the anticipated job classifications. See *Yellowstone International Mailing, Inc.*, 332 NLRB

No. 35 (2000), relying on *Custom Deliveries*, 315 NLRB 1018, 1019 fn. 8 (1994).

At the time of the hearing, the Aurora branch had 14 of 22 positions filled in 3 of the 6 classifications included in the unit that I have found to be appropriate. The Employer contends that the job classifications of respiratory therapist and senior warehouse clerk should also be considered, resulting in only 3 of 8 future classifications represented at present. I have found, however, that respiratory therapists should not be included in the appropriate unit, and the record fails to show that the title of “senior warehouse clerk” describes a job classification sufficiently separate and distinct from that of “warehouse clerk” in terms of types of skills required. *See Endicott Johnson de Puerto Rico, Inc.*, 172 NLRB 1676 (1968). Thus, the present complement at Aurora constitutes 64 percent of the anticipated full complement and 50 percent of the anticipated job classifications. Further, additional hiring is likely to occur before an election since the Employer had just posted the job openings to solicit bid requests from employees within its Rockies region. In these circumstances, I find that the present Aurora branch complement is substantial and representative for purposes of directing an immediate election.

2. The contracting Littleton unit

The Board’s guidelines for expanding units also apply where the unit is contracting. The Board described its policy in *MJM Studios*, slip op. at 3:

To warrant an immediate election where there is definite evidence of an expanding or contracting unit, the present work complement must be substantial and representative of the ultimate complement to be employed in the near future, projected both as to the number of employees and the number and kind of classifications. *Douglas Motors Corp.*, 128 NLRB 307, 308 (1960). A mere reduction in the number of employees is insufficient to warrant dismissal of the petition; the Board will examine whether the reduction is a result of a “fundamental change in the nature of the Employer’s business operations.” *Id.*

Under this policy, the first question is whether there is “definite evidence” of a contracting unit at the Littleton branch. Initially, I note that 14 employees have already transferred from Littleton to Aurora, and more may do so prior to an election. The Employer claims that Littleton will be reduced to approximately the same size as the other branches when all branches have been opened and are fully operational. There is no basis for concluding that the Employer does not intend to open branches in Arvada and Parker, although the target dates cannot be considered definite. Moreover, the feasibility of a downtown Denver branch is only now receiving a preliminary analysis and it does not appear that a definite decision has been made to open that branch. Nevertheless, even if target dates are not met, there does appear to be definite evidence that Aurora, Arvada, and Parker will become fully operational within the forthcoming year, and that Littleton will be reduced in size as a result.

The next question to consider is whether the present Littleton branch work complement is substantial and representative of the ultimate complement to be employed there in the near future, with respect both to the number of employees and the number and kind of classifications. Record evidence shows that at the time of the hearing, 48 employees worked in classifications included in the unit I have found to be appropriate, including 4 patient service coordinators (PSCs). If the complement at Littleton is reduced in the near future to the size anticipated for the other branches, as the Employer contends, 26 employees working in classifications included in the appropriate unit will remain, including the 4 PSCs. Thus, it would appear that the anticipated future complement at the Littleton branch is 26 employees, a reduction of approximately 45 percent. If the downtown Denver branch is not opened in the near future, and Littleton continues to serve that area, presumably the future complement at Littleton would be greater than 26 employees.

Regarding the number and kind of classifications, there is no record evidence that the reductions contemplated for the Littleton branch will result in any significant changes. At the time of the hearing, the one delivery technician (DT) position at the Littleton branch was open, but the Employer was planning to fill it. Although the Employer's new branch model does not include PSCs in each branch, according to testimony, PSCs will continue to work at the centralized patient contact center in the Littleton facility. These employees are presently considered Littleton branch employees, and there is no record evidence that this will change. The current Littleton branch complement also includes employees working in the classifications of PST, CST, dispatcher, warehouse clerk, and transportation lead, and these classifications will remain after the expected changes.

The Employer argues, however, that the relative number of employees in each classification at the Littleton branch will change substantially under the new model, resulting in greater or lesser influence in an immediate election than they would after the changes. The Board's policy, as described in *MJM Studios*, is to determine if the "number of employees" and the "number and kinds of classifications" in the present complement are substantial and representative of those projected for the future complement. The Board's policy does not require that the number of employees within each classification also be substantial and representative.⁷

The final consideration under the Board's guidelines is whether any reduction occurring in the number of employees is the result of a fundamental change in the nature of the Employer's business operations. The change expected at the Littleton branch is not a fundamental operational one. Employees will continue to do exactly what they do now. They will report to work at the same facility, drive the same vehicles, deliver the same equipment and supplies, and

⁷ Presumably, substantial changes in the number of employees within job classifications would be an indication of fundamental operational changes, which is a relevant, but separate, consideration.

provide these deliveries and other services to the same type of patients on the same delivery routes. The only difference will be that the Littleton branch will service a smaller geographic area with fewer employees. A reduction in the size of a business operation is not the type of operational change considered significant by the Board. *See Plymouth Shoe Co.*, 185 NLRB 732 (1970) (employer changed from manufacturing to warehousing); *Douglas Motors Corp.*, 128 NLRB 307 (1960) (employer eliminated manufacturing aspect of operation). In *Cooper International, Inc.*, 205 NLRB 1057 (1973), relied upon by the Employer, the employer planned an imminent transfer of its entire operation to a new location 18 miles away, and the Board dismissed the petition, without prejudice, in the absence of evidence that a considerable proportion of the unit employees would accept employment at the new location. Since there is no suggestion here that the entire Littleton branch operation will be transferred, *Cooper International* is clearly distinguishable. Accordingly, I find that the present Littleton branch work complement is substantial and representative of the ultimate complement to be employed there in the near future and an immediate election is warranted.

III. CONCLUSION

Consistent with the above, I find that the petitioned-for employees at the Littleton and Aurora locations constitute appropriate separate units for purposes of collective bargaining, that an immediate election is warranted in those units, and direct an election accordingly.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate at the time and place set forth in the Notice of Election to issue

subsequently, subject to the Board's Rules and Regulations.⁸ Eligible to vote are those in the units who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have maintained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL UNION NO. 435**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access

⁸ Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days from the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-5433, on or before **July 23, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **July 30, 2003**. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at Denver, Colorado, this 16th day of July 2003.

B. Allan Benson, Regional Director
National Labor Relations Board
Region 27
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Denver, Colorado 80202-5433

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